

**IN THE CIRCUIT COURT OF GREENE COUNTY
STATE OF MISSOURI**

**STATE OF MISSOURI, ex rel.
Attorney General Chris Koster,**

Plaintiff,

vs.

Case No:

Division:

**TIMOTHY DUANE PELC d/b/a
M and P AUTO GROUP**

**Serve: Timothy Duane Pelc
6162 E Farm Rd. 134
Strafford, MO 65757**

AND

**JONATHAN METCALF d/b/a
M and P AUTO GROUP**

**Serve: Jonathan Metcalf
3436 W Tracey Ct,
Springfield, MO 65807**

AND

FLOORPLAN XPRESS, LLC

**Serve: Craig Owens
8801 E. 63rd St, Suite 104
Raytown, MO 64133**

Defendants.

**PETITION FOR PRELIMINARY, PERMANENT, AND MANDATORY
INJUNCTIONS, RESTITUTION, CIVIL PENALTIES AND OTHER
COURT ORDERS**

Plaintiff the State of Missouri, ex rel. Chris Koster, Attorney General, by and through Assistant Attorney General Melissa A. Cullmann, for its Petition for Preliminary, Permanent, Mandatory Injunctions, Restitution, Civil Penalties and Other Court Orders, against Timothy Duane Pelc and Jonathan Metcalf d/b/a M and P Auto Group, and Floorplan Xpress, LLC (“Defendants”), upon information and belief, states as follows:

PARTIES

1. Chris Koster is the duly elected, qualified, and acting Attorney General of the State of Missouri and brings this action in his official capacity pursuant to Chapter 407, RSMo 2010.¹

2. Defendant M and P Auto Group is fictitious registration with the Missouri Secretary of State located at 1445 East St. Louis, Springfield, Missouri 65802. Its owners and operators are Defendant Timothy Duane Pelc (“Pelc”) who resides at 6162 East Farm Road 134, Strafford, Missouri 65757 and Defendant Jonathan Metcalf (“Metcalf”) who resides at 3436 West Tracey Court, Springfield, Missouri 65807.

3. Floorplan Xpress LLC (“Xpress”) is a Missouri limited liability company registered with the Missouri Secretary of State that transacts

¹ All references are to Missouri Revised Statutes 2010, unless otherwise noted. Where a citation gives a supplement year—*e.g.* “(Supp. 2012)” —the citation is to the version of the statute that appears in the corresponding supplementary version of the Missouri Revised Statutes, and, where relevant, to identical versions published in previous supplements.

business in Greene County, Missouri, among other places. It is headquartered at 4300 Highline Boulevard, Suite B330, Oklahoma City, Oklahoma 73108.

4. Defendant Xpress' registered agent, Craig Owens, is located at 8801 East 63rd Street, Suite 104, Raytown, Missouri 64133.

5. Any acts, practices, methods, uses, solicitations or conduct of the Defendants alleged in this Petition includes the acts, practices, methods, uses, solicitations or conduct of Defendants and Defendants' employees, agents, or other representatives acting under Defendants' direction, control, or authority.

6. Defendants have done business within the State of Missouri by marketing, advertising, financing, offering for sale, and selling automobiles to persons within the State of Missouri.

JURISDICTION

7. Jurisdiction is properly vested with this Court under Art. V, § 14 Mo. Const.

8. This Court has subject matter and personal jurisdiction over the Defendants under Art. V, § 14 Mo. Const.

9. This Court has authority over this action pursuant to § 407.100, which allows the Attorney General to seek injunctive relief, restitution, penalties, and other relief in circuit court against persons who violate

§ 407.020.

VENUE

10. Venue is proper in this Court pursuant to § 407.100.7, which provides that “[a]ny action under this section may be brought in the county in which the defendant resides, in which the violation alleged to have been committed occurred, or in which the defendant has his principal place of business.”

11. Defendants marketed, advertised, financed, offered, and sold automobiles in Greene County, Missouri, and have engaged in the acts, practices, methods, uses, solicitation and conduct described below that violate § 407.020, RSMo in Greene County, Missouri.

MERCHANDISING PRACTICES ACT

12. Section 407.020 of the Merchandising Practices Act provides in pertinent part:

1.The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in section 407.453, in or from the state of Missouri, is declared to be an unlawful practice... Any act, use or employment declared unlawful by this subsection violates this subsection whether committed before, during or after the sale, advertisement, or solicitation.

13. “Person” is defined as “any natural person or his legal representative, partnership, firm, for-profit or not-for-profit corporation, whether domestic or foreign, company, foundation, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestui que trust thereof.” § 407.010.5.

14. Wholesalers are “persons” liable for violations of the Merchandising Practices Act, and privity with consumer is not required. *Gibbons v. J. Nuckolls, Inc.*, 216 S.W. 3d 667, 670 (Mo. 2007).

15. “Merchandise” is defined as “any objects, wares, goods, commodities, intangibles, real estate, or services.” § 407.010(4).

16. “Trade” or “commerce” is defined as “the advertising, offering for sale, sale, or distribution, or any combination thereof, of any services and any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value wherever situated. The terms “trade” and “commerce” include any trade or commerce directly or indirectly affecting the people of this state.” § 407.010(7).

17. Defendants have advertised, marketed, and sold merchandise in trade or commerce within the meaning of § 407.010.

18. Pursuant to authority granted in § 407.145, the Attorney General

has promulgated rules explaining and defining terms utilized in Sections 407.010 to 407.145 of the Merchandising Practices Act. Said Rules are contained in the Missouri Code of State Regulations (CSR). The rules relevant to the Merchandising Practices Act allegations herein include, but are not limited to, the provisions of 15 CSR 60-3.010 to 15 CSR 60-14.040. These rules are adopted and incorporated by reference.

SALE AND TRANSFER OF VEHICLES

19. Section 301.210 of the Missouri Revised Statutes provides in pertinent part:

1. In the event of a sale or transfer of ownership of a motor vehicle or trailer for which a certificate of ownership has been issued, the holder of such certificate shall endorse on the same an assignment thereof, with warranty of title in form printed thereon, and prescribed by the director of revenue, with a statement of all liens or encumbrances on such motor vehicle or trailer, and deliver the same to the buyer at the time of the delivery to him of such motor vehicle or trailer...

20. Dealer, as the certificate owner of a vehicle, has a legal right to transfer possession of a vehicle to a buyer pending completion of the sale. Physical transfer of possession creates an executor contract between dealer and buyer which grants buyer the right to compel assignment of the certificates of ownership from dealer; and consequently the right to seek

delivery of the certificates from floor plan financier. *Bradley v. K & E Investments*, 847 S.W.2d 915, 920 (Mo. App. 1993)

21. An automobile dealership's creditor's possession of certificate of ownership is not a substitute for lien perfection. *Id* at 922.

UNIFORM COMMERCIAL CODE

22. UCC Article 9 § 1-201 defines a buyer in the ordinary course of business as one who in good faith buys goods from a business that sells goods of that kind, without knowledge that the sale violates the rights of another person.

23. Absent certain exceptions, a buyer in the ordinary course of business takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence. § 400.9-320, RSMo.

ALLEGATIONS OF FACT RELEVANT TO ALL COUNTS

24. Defendant Xpress sells financing services to automobile dealerships.

25. From at least April 2013, Defendant Pelc owned and Defendant Metcalf operated M and P Auto Group as an automobile dealership that marketed, advertised, offered to sell and sold automobiles to Missouri consumers.

26. Defendant Xpress loaned Defendants Pelc and Metcalf money to purchase automobiles in return for a security interest in the vehicles.

27. Defendant Xpress kept physical possession of certificates of title of the automobiles in Defendants Pelc and Metcalf's inventory.

28. When Defendants Pelc and Metcalf sold an automobile to a consumer, Pelc and Metcalf were required to pay Defendant Xpress before Xpress would release the title to Pelc and Metcalf.

29. Defendant Xpress withheld transfer of titles from Defendants Pelc and Metcalf as substitution for valid perfection of a lien or encumbrance against the automobiles and in order to assure repayment on Pelc and Metcalf's loan.

30. Defendants Pelc and Metcalf collected payments from consumers for the automobiles sold and delivered, but did not make payment to Defendant Xpress.

31. Despite knowing that they did not possess the titles, Defendants Pelc and Metcalf sold vehicles and promised consumers that they would provide titles to the vehicle after sale or transfer.

32. Defendant Xpress knew Defendants Pelc and Metcalf sold and delivered cars to consumers when Defendant Xpress physically possessed the certificates of title to those vehicles.

33. Defendant Xpress' physical possession of the certificates of title prevented the title from being transferred at the time of sale.

34. Consumers were unable to register their automobiles after purchase and delivery because of Defendant Xpress' retention of the certificates of title.

35. Without a properly registered certificate of title, a consumer cannot legally drive an automobile.

36. Defendants, pursuant to § 301.210, RSMo, were required to transfer motor vehicle titles to buyers at the time of sale or transfer of the vehicle.

37. Defendants failed to transfer certificates of title at the time of sale or transfer.

Consumer Examples

38. Defendants Pelc and Metcalf sold vehicles to the following consumers and did not deliver titles at the time of sale or transfer;

a. Troy Kittrell, who contracted with Defendants on or about June 9, 2013, purchased a vehicle for \$2,100.00;

b. Jim Hoyt who contracted with Defendants on or about August 2, 2013, purchased a vehicle for \$750.00;

c. Brian Thornton, who contracted with Defendants on or about June 24, 2013, purchased a vehicle for \$750.00;

d. Nicole Jenanian, who contracted with Defendants on or about June 19, 2013, purchased a vehicle for \$1,900.00;

e. Johnathan Thompson, who contracted with Defendants on or about June 18, 2013, purchased a vehicle for \$1,000.00;

f. Ian Davis, who contracted with Defendants on or about July 13, 2013, purchased a vehicle for \$2,000.00

g. Richard Conway, who contracted with Defendants on or about June 29, 2013, purchased a vehicle for \$4,300.00.

h. Kirsten Ward, who contracted with Defendants on or about August 3, 2013, purchased a vehicle for \$1,300.00

i. Eric Krugler, who contracted with Defendants on or about July 19 2013, purchased a vehicle for \$5,000.00.

j. Randy Casteel, who contracted with Defendants on or about July 31, 2013, purchased a vehicle for \$3,350.00.

k. Megan Overstrat, who contracted with Defendants on or about August 2, 2013, purchased a vehicle for \$950.00.

l. Jeff Shepperly, who contracted with Defendants on or about August 3, 2013, purchased a vehicle for \$1,500.00.

VIOLATIONS OF LAW

COUNT I: FALSE PROMISE Against Defendants Pelc and Metcalf

39. Plaintiff incorporates all allegations stated above.

40. Defendants Pelc and Metcalf violated Section 407.020 by falsely promising consumers that Defendants would provide the vehicle's title to the consumer, a statement which was false or misleading as to Defendants' intention or ability to perform the promise, or likelihood the promise will be performed.

**COUNT II: DECEPTION
Against Defendants Pelc and Metcalf**

41. Plaintiff incorporates all allegations stated above.

42. Defendants Pelc and Metcalf violated Section 407.020 by using deception in that Defendants engaged in acts or practices which had the tendency or capacity to mislead, deceive, or cheat and tended to create the false impression that Defendants had the ability to transfer the certificates of title for the vehicles being sold and delivered to consumers when in fact Defendants did not physically possess the certificates of title.

**COUNT III: CONCEALMENT, SUPPRESSION,
OR OMISSION OF A MATERIAL FACT
Against Defendants Pelc and Metcalf**

43. Plaintiff incorporates all allegations stated above.

44. Defendants Pelc and Metcalf violated Section 407.020 by omitting the material fact that Defendants did not physically possess the certificates of title to be able to transfer them to consumers at the time of delivery.

**COUNT IV: UNFAIR PRACTICE
Against Defendants Pelc, Metcalf, and Xpress**

45. Plaintiff incorporates all allegations stated above.

46. Defendants Pelc, Metcalf, and Xpress violated Section 407.020 by engaging in the method, use or practice of selling and delivering automobiles to consumers without passing or transferring title which violates § 301.210, RSMo, a statute intended to protect the public.

47. Defendants' violation presents the risk of, and causes substantial injury to consumers because violations of § 301.210 harmed, and will continue to harm, consumers.

RELIEF

WHEREFORE, Plaintiff prays this Court enter judgment:

A. Finding that the Defendants violated the provisions of Section 407.020.

B. Issuing Preliminary and Permanent Injunctions issued pursuant to §§ 407.100.1 and 407.100.2 prohibiting and enjoining the Defendants and their agents, servants, employees, representatives and other individuals

acting at its direction or on its behalf from selling automobiles in the State of Missouri.

C. Issuing Preliminary and Permanent Injunctions that require the Defendants and their agents, servants, employees, representatives and other individuals acting at their direction or on their behalf to transfer titles on vehicles purchased by consumers to any and all consumers who purchased vehicles prior to the filing of this action and have not received properly executed title.

D. Requiring the Defendants pursuant to § 407.100.4 to provide full restitution to all consumers who suffered any ascertainable loss, including but not limited to any monies or property acquired by Defendants through unlawful practices.

E. Requiring the Defendants pursuant to § 407.100.6 to pay the State of Missouri a civil penalty in such amounts as allowed by law per violation of Chapter 407 that the Court finds to have occurred.

F. Requiring the Defendants pursuant to § 407.140.3 to pay to the State an amount of money equal to ten percent (10%) of the total restitution ordered against the Defendant, or such other amount as the Court deems fair and equitable.

G. Requiring the Defendants pursuant to § 407.130 to pay all court, investigative and prosecution costs of this case.

H. Granting any further relief that this Court deems proper in the premise.

Respectfully submitted,

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Attorney General

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